

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

ARTHUR B. CHERRY,

Petitioner,

v.

Case No. 08-12465

Honorable Thomas L. Ludington

NICK J. LUDWICK,

Respondent.

ORDER DECLINING TO GRANT CERTIFICATE OF APPEALABILITY

Petitioner Arthur B. Cherry is a Michigan prisoner currently confined at the Lakeland Correctional Facility in Coldwater, Michigan. On June 10, 2008, Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his convictions for first-degree felony murder, assault with intent to rob while armed, and felony firearm following a jury trial in the Wayne County Circuit Court on October 21, 2002. On November 15, 2002, Petitioner was sentenced to concurrent terms of life in prison for the murder conviction and twenty-three years, nine months to fifty years in prison for the assault conviction. Those terms are to be served consecutively to the mandatory two-year prison term Petitioner received for the felony-firearm conviction.

On August 18, 2011, this Court denied Petitioner's petition for writ of habeas corpus and also declined to issue Petitioner a certificate of appealability, finding that Petitioner had not made a substantial showing of the denial of a constitutional right. *Cherry v. Ludwick*, No. 08-12465, 2011 WL 3652188, at *13 (E.D. Mich. Aug. 18, 2011). Petitioner then filed an application for a certificate of appealability with the Sixth Circuit, which was denied on April 17, 2012.

Petitioner returned to this Court on July 16, 2012 with a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b). Petitioner alleged that there was sufficient “fraud upon the Court” to warrant relief. Pet’r’s Mot. 2, 7, ECF No. 22. The Court determined that Petitioner had “not provided clear and convincing evidence of fraud on the Court,” and his motion for relief was denied. *Cherry v. Ludwick*, No. 08-12465, 2012 WL 4815076, at *2 (E.D. Mich. Oct. 10, 2012). Petitioner filed notice of appeal on November 7, 2012, and paid the appeal fee of \$455 on December 17, 2012.

On January 25, 2013, the Sixth Circuit remanded the case to this Court “for the sole purpose of determining whether to grant or deny a certificate of appealability” pursuant to Federal Rule of Appellate Procedure 22(b). The Sixth Circuit “will not entertain an appeal from the denial of a Rule 60(b) motion in an AEDPA proceeding unless the petitioner first obtains a [Certificate of Appealability].” *Johnson v. Bell*, 605 F.3d 333, 339 (6th Cir. 2010) (citing *United States v. Hardin*, 481 F.3d 924, 926 (6th Cir. 2007)).

Of course, according to Rule 22(b)(2), “[i]f no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.” Following this logical guide, the Sixth Circuit in *Johnson* did not remand “to enable petitioner to file an application for a COA,” but instead “construe[d] his appeal as such.” *Id.* Although the circumstances here are identical, the Sixth Circuit decided to remand the case to this Court without explanation.

On August 18, 2011, this Court declined to issue Petitioner a certificate of appealability as he had failed to make a substantial showing of the denial of a constitutional right. On October 10, 2012, this Court denied to provide any relief from that judgment. Nothing has changed since this Court made the decision to deny a certificate of appealability and then refused to grant relief

from that judgment. Petitioner will not now be granted a certificate of appealability by this Court.

Accordingly, it is **ORDERED** that this Court once again **DECLINES** to issue Petitioner a certificate of appealability.

Dated: February 11, 2013

s/Thomas L. Ludington
THOMAS L. LUDINGTON
United States District Judge

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney of record herein by electronic means and upon Arthur B. Cherry, #364212 at Lakeland Correctional Facility, 141 First Street, Coldwater, MI 49036 by first class U.S. mail on February 11, 2013.

s/Tracy A. Jacobs
TRACY A. JACOBS